Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY MARTIN MERCER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF APPEALS,
FIFTH DISTRICT OF TEXAS AT DALLAS

PETITION FOR WRIT OF CERTIORARI

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February 4, 2004

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QUESTIONS PRESENTED

1. Whether the standard of review applicable in suppression hearings prescribed by *Ornelas* applies in state court cases in which the Fourth Amendment is implicated, and, if so, whether the court of appeals properly applied the standard in this case.

2. Whether the court of appeals failed to apply *Florida v. J.L.** when it concluded that a police officer had the right to stop the Petitioner's vehicle based on an anonymous tip.

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*529 U.S. 266 (2000).

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PETITION FOR WRIT OF CERTIORARI

TIMOTHY MARTIN MERCER, Petitioner, petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Fifth District of Texas reversing the trial court's order granting the Petitioner's motion to suppress evidence. He seeks resolution of two important issues: (1) Whether the standard of review applicable in suppression hearings prescribed by *Ornelas*[1] applies in state court cases in which the Fourth Amendment is implicated,and if so, whether the court of appeals properly applied the standard in this case. And, (2) whether the court of appeals failed to apply *Florida v. J.L.*[2] when it concluded that a police officer had the right to stop the Petitioner's vehicle based on an anonymous tip.

OPINION BELOW

The opinion of the court of appeals is not reported. *State v. Mercer*, No. 05-02-01359-CR, Tex.-App. – Dallas, 16 April 2003. A copy of the opinion is appended hereto as Appendix A, *infra.*

JURISDICTION

The court of appeals reversed the trial court's order granting the Petitioner's motion to suppress evidence on 16 April 2003. A timely filed motion for rehearing was denied on 19 June 2003.[3] A petition for discretionary

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[1] *Ornelas v. United States*, 517 U.S. 690 (1996).

[2] 529 U.S. 266 (2000).

[3] A copy of that denial appears at Appendix B.

review filed with the Texas Court of Criminal Appeals was refused without opinion on 5 November 2003.[4] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law; . . .

STATEMENT

THE SUPPRESSION HEARING TESTIMONY

The Petitioner was charged by information with driving while intoxicated.[5] He filed a pretrial motion to suppress evidence. At the pretrial hearing held on that motion the State presented one witness – Carrollton police officer Don Patin. Patin testified that on 31 August

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[4] A copy of that refusal appears at Appendix C.

[5] Cause No. M01-16946-B pending in the County Criminal Court No. 2 of Dallas County, Texas.

2001 a message from an anonymous caller was relayed to him by the police dispatcher about a "possible intoxicated driver driving a gold pickup truck" "westbound on Belt Line Road that was weaving . . . possibly an intoxicated driver."[6] At some indeterminate time thereafter, Patin located a truck that "generally fit the description" and followed it.[7] Over the course of one block Patin observed the left tires of the gold pickup truck move to the left across a painted lane divider and then move back into the right-hand lane of traffic.[8] RR 9. The truck never moved to the right, RR 9, and never exceeded the speed limit. RR 14. Based on these movements, Paton effected a warrantless "traffic stop" believing that the movements he observed constituted "two illegal lane changes," RR 5-6, and that the truck had thus violated the traffic laws of the State of Texas. RR 10.[9]

On direct examination Patin testified that other traffic on Belt Line Road "was having to stay back away from this truck's actions," RR 6, and that other traffic on Belt Line Road "appeared to be avoiding contact with the gold pickup as it changed lanes illegally." RR 7. However, on cross-examination, when confronted with prior testimony given at another hearing, Patin acknowledged that when initially asked why the other traffic on Belt Line Road was not passing his squad car he

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[6] Reporter's transcription of Motion to Suppress Hearing (RR), 2 August 2002, page 5.

[7] The Petitioner was driving the gold pickup truck.

[8] Patin testified that Belt Line Road was a multiple lane highway with three lanes designated for traffic in each direction, RR 6, and a curb on the right side of the roadway. RR 9.

[9] Patin testified that he stopped the Petitioner's truck because its tires moved across the divider line on two occasions and he believed that to be a violation of the traffic laws. RR 12.

responded that "the reason the other vehicles in the area weren't passing [his squad car] was because [Patin] believed they didn't want to pass a police car for fear of thinking they were speeding" and that the failure of other cars on Belt Line Road to pass either the squad car or the gold pickup truck "[h]ad nothing to do with the activities or acts of the gold pickup truck." RR 15-16.

The Petitioner argued to the trial court that under numerous Texas cases the movement of the truck's left tires crossing the divider line was not a violation of Texas traffic law for which a stop could lawfully be made unless there was evidence that the movement was made unsafely, and thus, based on the officer's testimony that the other vehicles on the roadway were not affected by any movement of the gold pickup truck, there was no evidence upon which the court could find that the movements were made unsafely. RR 18-19. After reviewing cases provided by the Petitioner, the trial court granted the motion. RR 20, 22.

THE COURT OF APPEALS'S TREATMENT OF THE ISSUES

The court of appeals concluded that "the totality of the circumstances in this case objectively amount to a reasonable suspicion that [the Petitioner] was driving while intoxicated." *State v. Mercer, supra,* slip op. 3. It rejected the trial court's announced conclusion that the officer did not have the right to make the traffic stop.

In support of its conclusion, the court of appeals recited as facts that the gold pickup truck "was in heavy traffic" and that "[t]he officer noticed other drivers avoiding contact with [the gold pickup truck], and he feared for their safety." *State v. Mercer, supra,* slip op. 3.

REASONS FOR GRANTING THE WRIT

I.

The standard of review for suppression issues set forth in *Ornelas* should apply in any case in which suppression is sought under the Fourth Amendment, as a function of the due process clause of the Fourteenth Amendment, in order to ensure proper application of the Fourth Amendment. It is clear that the court of appeals in this case did not properly apply or follow *Ornelas* because the court of appeals relied upon facts that were impliedly rejected by the trial court when the trial court concluded that the officer did not have the right to stop the Petitioner's pickup.

Ornelas prescribes a comprehensive standard of review for suppression issues based on the two principal components of a determination of those issues: "the events which occurred leading up to the stop" and "whether those historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause." *Ornelas*, 517 U.S. at 696. Almost total deference should be given by an appellate court to the trial court with respect to the determination of the historical facts, subject to a review of those findings for clear error. *Id.* at 699. This deference is particularly appropriate when a determination of a fact turns on the credibility of a witness; in such a situation the trial court is in the best position to evaluate demeanor, and thus "there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). With respect to whether or not those facts amount to reasonable suspicion or probable cause, appel-

late courts should conduct a *de novo* review and ascertain "whether the rule of law as applied to the established facts is or is not violated." *Id.* at 697, citing *Pullman-Standard v. Swint*, 456 U.S. 273, 299 (1982). Since *Ornelas* was an appeal from a federal court, this Court did not decide whether *Ornelas* should apply in state courts.

The *Ornelas* standard should be applied in state court proceedings in which searches and/or seizures are challenged under the Fourth Amendment in order to assure consistency in the application of the body of Fourth Amendment law. Appellate courts are charged with maintaining control of, and clarifying the legal principles applicable to the Fourth Amendment. *Ornelas*, 517 U.S. at 697, citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985). In order to "unify precedent, and stabilize the law" and to provide a "defined set of rules" applicable to Fourth Amendment issues, *Ornelas*, 517 U.S. at 696-97, citing *New York v. Belton*, 453 U.S. 454, 458 (1981), and *Thompson v. Keohane*, 516 U.S. 99, 115 (1995), it is essential that a single standard for appellate review of Fourth Amendment issues be adopted and made applicable to state court proceedings. There is ample precedent for this request inasmuch as this Court has formulated procedural requirements that apply to state courts via the Fourteenth Amendment in resolving other Fourth Amendment issues. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (the party seeking to justify a warrantless search or seizure bears the burden of proving that the search or seizure was reasonable); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (the prosecution bears the burden of proving consent to search).[10]

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[10]This Court has required state courts to follow certain procedures with respect to protections afforded by other amendments

[footnote continued]

The court of appeals violated the *Ornelas* standard in this case by not giving due weight to the findings of historical fact made by the trial court, and by relying on facts that were the subject of serious credibility issues which were implicitly resolved by the trial court in favor of the Petitioner.[11] Whether the movement of the Petitioner's truck was made safely was crucial to the trial court's conclusion. If the trial court believed one version of the officer's testimony, the movement of the vehicle constituted a violation of Texas law for which the officer could lawfully stop the vehicle. However, if the trial court believed the other version of the officer's testimony – that the other traffic on the road was not affected by the movement of the Petitioner's truck – then under Texas law the officer did not have the right to make the traffic stop.[12] By granting the motion to suppress the trial court implicitly resolved the credibility issue favorably to the Petitioner and concluded that the reason the other traffic in the area remained behind the

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in order to assure a consistent application of constitutionally secured rights. *Jackson v. Denno*, 378 U.S. 368 (1964) (determining the admissibility of a confession under the Fifth Amendment).

[11]The court of appeals applied a state standard similar to the one adopted in *Ornelas*. *State v. Mercer, supra,* slip op. 2. However, it is clear from the facts found and used by the court of appeals that it did not apply or follow the standard enunciated in *Ornelas* and *Miller v. Fenton*.

[12]A violation of §545.060, TEX. TRANS. CODE, occurs only when a vehicle moves from one lane into another lane of traffic designated for travel in the same direction without first ascertaining that the movement can be made safely. *Bass v. State*, 64 S.W.3d 646, 650-51 (Tex. App. – Texarkana 2001, pet. ref'd); *Ehrhart v. State*, 9 S.W.3d 929, 930 (Tex. App. – Beaumont 2000, no pet.); *State v. Arraiga*, 5 S.W.3d 804, 806 (Tex. App. – San Antonio 1999, pet. ref'd); *Hernandez v. State*, 983 S.W.2d 867, 870-72 (Tex.App. – Austin 1998, pet. ref'd).

officer's squad car was unrelated to the movement of the Petitioner's truck. *Ornelas* clearly commands appellate courts to give great deference to a trial court's findings with respect to credibility of witnesses since the trial court is in the best position to make those determinations. By concluding that the Petitioner's truck "was in heavy traffic" and that the officer "noticed other drivers avoiding contact with [the Petitioner's] truck," the court of appeals ignored the plan mandate of *Ornelas* to defer to the trial court's determinations of fact, especially when those determinations involved the credibility of witnesses.

Certiorari should be granted to consider whether *Ornelas* applies to state court determinations of Fourth Amendment issues, and, if it does, to consider whether the Texas court of appeals properly applied *Ornelas* and *Miller v. Fenton* with respect to the critical facts.

II.

The court of appeals failed to consider and apply *Florida v. J.L.* and erroneously concluded that the arresting officer had reasonable suspicion to believe that the Petitioner was driving while intoxicated.[13]

An anonymous tip is rarely sufficient to serve as the basis for a forcible stop of a citizen becaue such a tip "seldom demonstrates the informant's basis of knowledge or veracity," which are essential to the right of a peace officer to effect a warrantless Fourth Amendment

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[13]The Petitioner expressly relied upon *Florida v. J.L.* in his brief and in his motion for rehearing filed with the court of appeals. Appellee's Brief 5; Appellee's Motion for Rehearing 4, *State v. Mercer, supra.*

protected seizure.[14] To be sufficient, an anonymous tip must provide information from which it can be concluded that the tipster is either honest or that his information is reliable. *Alabama v. White*, 496 U.S. 325, 329 (1990), citing *Illinois v. Gates*, 462 U.S. 213, 227 (1983). To accomplish this objective, an anonymous tip must not only identify the accused; it must show that the tipster has knowledge of the criminal activity he is reporting. *Florida v. J.L., supra*, 529 U.S. at 272. Before reasonable suspicion to stop can arise from an anonymous tip, the tip must be shown to "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.*

The anonymous tip in this case, like the tips in *Gates*, in *Alabama v. White*, and in *Florida v. J.L.*, contains no facts describing the "weaving" reported by the tipster, and, more importantly, the tip does not provide any basis for the tipster's conclusion that the driver of the gold pickup truck was "possibly intoxicated." The tip clearly would not warrant a "man of reasonable caution in the belief that [a stop of the truck] was appropriate. *Alabama v. White, supra*, 496 U.S. at 329.

The question in anonymous tip cases is whether, considering the totality of the circumstances, *Illinois v. Gates, supra*, the tip was suitably corroborated by police investigation such that the tip exhibited a "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Alabama v. White, supra*, 496 U.S. at 327. That is, did the police independently observe facts that corroborate the part of the tip that

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[14]Stopping an automobile while it travels on a highway is a seizure within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996).

reports criminal activity. The corroborative facts in this case consist of the police officer's sighting of a gold pickup truck that generally matched the description of the one provided by the tipster an indeterminate amount of time after the tip was reported, and the officer's observation of the truck's left tires momentariliy crossing the painted lane dividers in the course of one block. Although the officer consistently maintained that these acts constituted a violation of Texas traffic laws – the reason he gave for stopping the truck, he never stated that any of the acts he observed suggested to him that the driver was intoxicated nor did he express any belief that the facts he observed corroborated the portion of the anonymous tip relating the criminal conduct, *i.e.*, that the driver of the truck was "possibly intoxicated."[15] Indeed, the officer did not claim that he stopped the Petitioner's truck for investigative purposes.[16] Because there was no corroboration of the criminal activity prong of the anonymous tip in this case, reasonable suspicion to make an investigative detention stop did not exist. The conclusion of the court of appeals to the contrary is in error because it failed to apply *Florida v. J.L.*

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[15] At least one Texas court has concluded, contrary to the court of appeals in this case, that when an officer initiates an investigative detention based on a tip that the accused is intoxicated the officer must corroborate the intoxication portion of the tip, as a component of the test established by *Florida v. J.L. Stewart v. State*, 22 S.W.3d 646, 648-49 (Tex. App. – Austin 2000, pet. ref'd).

[16] Another Texas court of appeals concluded that reasonable suspicion for an investigative stop did not exist where the officer did not testify to suspecting any criminal activity other than "weaving out of the lane" of traffic. *State v. Tarvin*, 972 S.W.2d 910, 912 (Tex. App. – Waco 1998, pet. ref'd).

Certiorari should be granted in order to determine whether the court of appeals erred in not applying *Florida v. J.L.* in this case.

CONCLUSION

Certiorari should be granted to allow for a review of the decision of the court of appeals (1) because *Ornelas* should apply to state court determinations of suppression issues that invoke the Fourth Amendment and because the court of appeals did not correctly apply the *Ornelas* standard in this case, and (2) because the court of appeals failed to apply *Florida v. J.L.* in determining whether reasonable suspicion existed to make an investigative detention stop of the Petitioner's truck.

Respectfully submitted,

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February 4, 2004

APPENDIX A

OPINION OF THE TEXAS COURT OF APPEALS

REVERSED AND REMANDED; Opinion issued April 16, 2003

[SEAL]

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-02-01359-CR

THE STATE OF TEXAS, Appellant

V.

TIMOTHY MARTIN MERCER, Appellee

On Appeal from the County Criminal Court No. 2
Dallas County, Texas
Trial Court Cause No. MB01-16946-B

OPINION

Before Justices Morris, Whittington, and Francis
Opinion By Justice Morris

The issue in this State's appeal is whether a police officer was justified in stopping Timothy Martin Mercer

after observing his car weaving in traffic. In a single issue, the State contends the arresting officer had reasonable suspicion sufficient to justify the stop. We agree and reverse the trial court's order granting appellee's motion to suppress.

The arresting officer received a dispatch call describing a possibly intoxicated driver. The dispatcher said that an anonymous caller had reported a white male in a gold pickup truck weaving in the westbound lanes of Belt Line Road. After receiving the call, the officer located a gold pickup truck that generally fit the description. He fell in behind the truck to observe the driver. On two occasions, despite heavy traffic on the road, the wheels of the pickup crossed the dotted lines between the right lane and the center lane and then returned to the right lane. Other vehicles near the pickup seemed to be slowing down to avoid contact with it. The officer was concerned about the safety of the other drivers. He admitted, however, that the other vehicles may also have slowed so they would not pass his police car. Because he believed appellee had violated traffic laws by failing to maintain a single lane of traffic and failing to signal a lane change, the officer stopped appellee.

Appellee challenged the stop in a motion to suppress, which was granted by the trial court. We must now determine whether the trial court erred in granting the motion. A police officer may stop and briefly detain a person for investigation if the officer, in light of his experience, reasonably believes that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968). Reasonable suspicion may be demonstrated by showing specific articulable facts that, when combined with rational inferences from those facts, would lead the

officer to reasonably suspect the person has engaged in or is engaging in criminal activity. *See Garcia v. State*, 43 S.W.2d 527, 530 (Tex. Crim. App. 2001). The subjective intent of the officer conducting the stop is irrelevant; as long as an objective basis exists for the stop under the totality of the circumstances, it will be upheld. *See id.*

In deciding whether the State has demonstrated an objective basis for the stop, we use a bifurcated standard of review. We give almost total deference to the trial court in determining what the actual facts are and then review *de novo* whether those facts were sufficient to give rise to reasonable suspicion. *See id.* The trial judge in this case verbally indicated that appellee's crossing the dividing line only two times was insufficient to justify the stop. Therefore, we know the trial court accepted the officer's uncontroverted testimony about appellee's actions, at least as to the weaving of his car, but thought appellee's actions did not give the officer reasonable suspicion for the stop. *See State v. Ross*, 32 S.W.3d 853, 858 (Tex. Crim. App. 2000) (holding that unless trial court expresses its rationale for granting a motion to suppress either verbally or in writing, where uncontrovertes testimony adds up to probable cause, appellate court must defer almost entirely to trial court's decision).

When the arresting officer located a truck matching the dispatcher's description of a possibly intoxicated driver, he saw appellee weave out of his lane two times without signaling, despite the fact that he was in heavy traffic. The officer noticed other drivers avoiding contact with appellee's truck, and he feared for their safety. We conclude the totality of the circumstances in this case objectively amount to a reasonable suspicion that appel-

lee was driving while intoxicated. *See Dowler v. State*, 44 S.W.3d 666, 670-71 (Tex. App. – Austin 2001, pet ref'd). Because the officer had reasonable suspicion to stop appellee, the trial court erred by granting appellee's motion to suppress. We resolve the State's sole issue in its favor.

We reverse the trial court's order and remand the case for further proceedings.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
JUSTICE

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APPENDIX B

ORDER DENYING MOTION FOR REHEARING

Order issued June 19, 2003

[SEAL]

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-02-01359-CR

THE STATE OF TEXAS, Appellant

V.

TIMOTHY MARTIN MERCER, Appellee

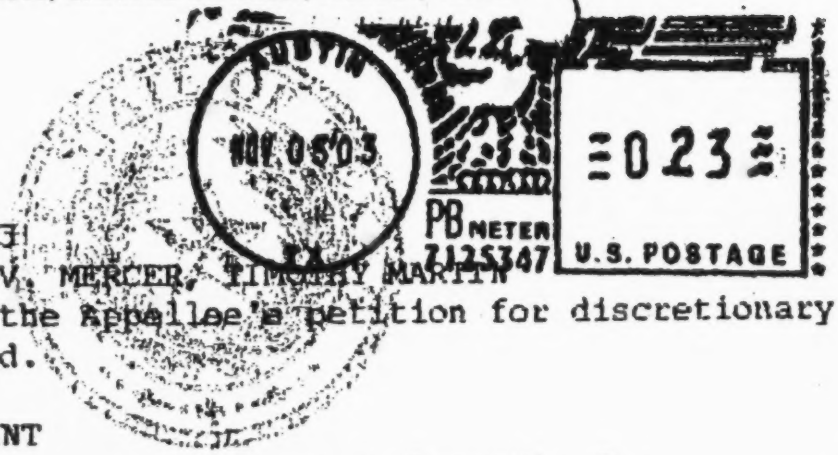
ORDER

Before Justices Morris, Whittington, and Francis

Appellee's Motion for Rehearing filed May 13, 2003, is **DENIED.**

/s/ Joseph B. Morris
JOSEPH B. MORRIS
JUSTICE

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P. O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



11/5/2003
COA#: 05-02-01359-CR
RE: Case No. PD-1210-03
STYLE: STATE OF TEXAS V. MERCER, TIMOTHY MARTIN

On this day, the Appellee's petition for discretionary review has been refused.

JUDGE MEYERS WOULD GRANT

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APPENDIX C

NOTICE REFUSING PETITION FOR DISCRETIONARY REVIEW